

ORIGINAL FILED
March 31 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

ROBERT JAMES THOMAS DOC # 2067081

Alpha House Pre-Release Center

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA-09-0674

ROBERT JAMES THOMAS

Petitioner : Appellant

v.

OPENING

BRIEF

STATE OF MONTANA

Respondent : Appellee

COMES NOW, Robert Thomas and submits this opening brief from appeal of Montana's Fourth Judicial District Court of Missoula County's District Court Honorable Judge John W. Larson in cause number DV-09-1313 filed October 28th 2009.

REASON FOR APPEAL

I have petitioned for post-conviction relief based on newly discovered evidence that, when proved and viewed in light of evidence as a whole, will show that I am actually innocent of the conduct that justified my felony criminal endangerment conviction from DC-04-083 in Missoula County.

On November 18th 2009, Judge Larson entered a denial of my post-conviction relief stating I was time-barred by § 46-21-102, MCA. It's this reason why I appeal.

It is my position that the District Court did not reach/consider my claim of actual innocence which overcomes the time bar if filed under one-year of discovery of exonerating Evidence, § 46-21-102(2).

RELIEF REQUESTED

I am asking the Montana Supreme Court to remand my petition back to District Court with instructions to grant my request for counsel so my claim of actual innocence may be furthered.

Ultimately I seek an evidentiary hearing to set aside the plea agreement so I may proceed to trial for acquittal as allowed by § 46-16-105(2), mca.

PLEASE LIBERALLY INTERPRET MY REQUEST

From the outset I have petitioned for appointment of counsel and so far have been met with denials. Tonight my third request sits on a desk in the Montana Supreme Court. This third petition itemizes the "extraordinary circumstances" that prevent my meaningful access to legal materials, SEE § 46-8-104(3), MCA, also SEE RESUBMITTED PETITION FOR APPOINTMENT OF COUNSEL AND EXTENSION OF TIME TO FILE OPENING BRIEF filed March 24th 2010. My request for counsel won't be answered before the opening brief is due therefore, here is my best attempt.

Between full time employment, mandatory treatment classes, mandatory A.A. attendance, Alpha House chores, filling out budgets and schedules and reports, I'm barely getting six hours of sleep per night. With my low level of community access, the public and city law library hours and policies, and the price per page to print case law or copy rules of court, I ask that this brief be liberally interpreted since I no longer have meaningful access to legal materials or an attorney. In fact, I'm writing this on the back of a piano since I don't even have access to a computer or a quiet place to do this, except with the piano.

I must rely on old and incomplete notes to make this happen, which were never written for an opening brief. Without meaningful access to legal resources, case law, MCA's, court rules and procedures, this brief falls short of many standards. That is why I ask this brief be allowed leniently since I never met to do this alone.

HISTORY

This arduous quest to prove my actual innocence began nearly one year ago when I sent for my defense file. I started with no experience in law or investigative practices but thru dedication, I learned.

Any legal scholar will attest to the difficulty of an actual innocence claim. I am just a lay person with a G.E.D. Despite this, I began to compile the Constitutional violations that probably resulted in the conviction of one who is actually innocent. This was in attempt to satisfy the requirements of *State v. Redcrow*, 1999 MT 95, ¶ 33, 294 Mont. 252, 980 P.2d 622 which quoted *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 867, 130 L.Ed. 2d 808, 836.

It was my understanding that Constitutional violations combined with a claim of actual innocence with evidence that satisfied all five Clark-Crosby factors would allow me to pass through the *Schlup* gateway. *State v. Clark*, 2005 MT 330, ¶ 34, 330 Mont. 8, 125 P.3d 1099 and *Crosby v. State*, 2006 MT 155, ¶ 20, 332 Mont. 460, 139 P.3d 832.

Therefore the core of my memorandum focuses on Constitutional violations and while that is in the Courts, I've been working to fine tune all the evidence and show how it proves my actual innocence. It's been difficult being indigent, incarcerated and lacking investigative skills but today, I'm almost ready.

I've been put over a barrel in that to satisfy the Court's requirement to pull the plea agreement, I must introduce the evidence. That's oh if I had the resources, money and training. Instead I risk attack from the State by tracking down and communicating with the witness who was never interviewed and holds a big piece of the puzzle.

The State could argue it's simple collusion. It's a possibility but there is other mentions and corroborating evidence from multiple sources that will further prove my original statement of events and my witness's statement are true, accurate and correct. It's another obstacle I'd rather not try and overcome but without counsel, how?

EVIDENCE ARGUMENT

So I'm sure everyone is wondering: Why wasn't the evidence presented to the District Court with the post-conviction relief petition? I have written out six reasons but I'll focus only ~~one~~ on one.

I stated in the Memorandum's Appendix at 2 - Affidavit written by Robert James Thomas - that the task of presenting the evidence and its significance is a job for a trained attorney.

I am very protective of the information I possess because of the numerous reasons contained within the Memorandum. I simply do not trust the State and ~~for~~ for many valid reasons.

Additionally, the Rules of Evidence allows the jury to make certain inferences and presumptions. This is important in my situation since the only piece of incriminating evidence is the officer that allegedly saw the dangerous driving. No other evidence is in his favor or supports his allegations; in fact, every single piece of evidence strongly discredits his version of events. The point is this: If I introduced the evidence and explained how it works to exonerate, then I have shut the door on legislatively enacted methods to disprove the officer's claims. That will hurt defense strategy. Shouldn't I be entitled to the same level of defense after trial as I am before trial?

Here's a possible solution: With counsel's assistance, we can submit the evidence for 'in-camera' review. This satisfies the Court's requirement to determine whether the evidence has a reasonable probability of resulting in a different outcome - the 5th Clark-Crosby factor - and still allows defense to utilize all available methods to disprove the officer's claims.

CONCLUSION

REMAND WITH COUNSEL, PLEASE

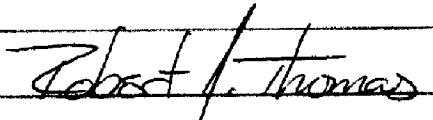
I've compiled the Constitutional violations, I've gather the evidence, I've interviewed individuals with intimate knowledge in law enforcement, I've written out in detail how the evidence disproves the dangerous driving allegations, I've relentlessly tracked down the witness and I've done all this over the last year from prison. Only a few items left but I need help.

The five Clark-Crosby factors need argued which is way out of my league since I've never seen them argued, only glossed over in Court Opinions. Also the witness' disposition needs to be taken. Those are small steps when compared to what I've already accomplished. I'd like to believe Montana, in the interest of justice, will allow a few hours from a trained attorney to look over what I have.

If counsel does not believe my evidence is sufficient, they can simply withdraw but that won't be the case since I'm positive my claim of actual innocence has merit and is provable, with the assistance of counsel.

Anyways, that's my argument.

Dated this 29th day of March, 2010.


ROBERT J. THOMAS

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing
OPENING BRIEF was deposited into the U.S. Mail with
postage prepaid to the following counsel:

Montana Attorney General
PO Box 201401
Helena, MT 59620-1401

Dated this 29th day of March, 2010

Robert J. Thomas

ROBERT J. THOMAS #2067081

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